

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 02-03-4
 :
 BENITO MARTIN LOPEZ-CHAPA : CIVIL ACTION NO. 03-6740
 :

MEMORANDUM

Padova, J.

June 4, 2004

Before the Court is Defendant Benito Martin Lopez-Chapa's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons which follow, the Court denies the Motion in all respects.

I. BACKGROUND

On January 29, 2002, pursuant to a written Guilty Plea Agreement, Lopez-Chapa pled guilty to Information No. 02-03 which charged him with conspiracy to possess and distribute more than 1000 kilograms of marijuana in violation of 18 U.S.C. § 846 (Count I). This charge arose out of a conspiracy between Jesse C. Harriott, Jermaine E. Heyliger, Rellen A. Thomas and Benito Martin Lopez-Chapa to ship loads of at least 500 kilograms of marijuana each by tractor trailer from McAllen, Texas to Philadelphia for distribution. On November 26, 2002, the Court sentenced Petitioner to 262 months incarceration, a \$1,000 fine, five years supervised release, and a \$100 special assessment. Petitioner filed a timely notice of appeal. On June 2, 2003, his appeal was dismissed pursuant to Federal Rule of Appellate Procedure 42(b). (Docket No. 125.) The instant Motion was filed on January 14, 2003.

II. LEGAL STANDARD

Defendant Lopez-Chapa has moved for relief pursuant to 18 U.S.C. § 2255, which statute provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.A. § 2255 (West Supp. 2001).

"Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors." United States v. Rishell, Civ.A.Nos. Nos. 97-294-1 and 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001) (citation omitted). In order to prevail on Section 2255 motion, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). Even an error that may justify a reversal on direct appeal will not necessarily sustain a collateral attack. See United States v. Addonizio, 442 U.S. 178, 184-85 (1979). A Section 2255 motion simply is not a substitute for a direct appeal. See United States v. Frady, 456 U.S. 152, 165 (1982). A district court has the discretion to summarily dismiss a motion brought under Section 2255

in cases where the motion, files, and records "show conclusively that the movant is not entitled to relief." United States v. Nahodil, 36 F.3d 323, 325 (3d Cir. 1994) (citing United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)).

III. DISCUSSION

Lopez-Chapa has asserted four grounds for relief pursuant to 28 U.S.C. § 2255:

1. He was provided ineffective assistance of counsel in that he was induced to plead guilty based on the belief that the Government would file a Motion to allow the Court to depart from the sentencing guidelines pursuant to U.S.S.G. § 5K1.1.
2. He was provided ineffective assistance of counsel in that his attorney did not object to an aggravating role enhancement to his base offense level pursuant to U.S.S.G. § 3B1.1(a) for being a leader or organizer of the conspiracy.
3. He was provided ineffective assistance of counsel in that his attorney did not object to an enhancement to his base offense level pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon in connection with a drug offense.¹

¹In his Motion, Lopez-Chapa incorrectly refers to the applicable section of the Sentencing Guidelines as U.S.S.G. § 2K1.5.

4. The Government breached the Guilty Plea Agreement and violated his Fifth Amendment right to due process by failing to file a Motion pursuant to U.S.S.G. § 5K1.1.

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are governed by the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain a reversal of a conviction on the ground that counsel was ineffective, the movant must establish: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687. Counsel is presumed effective, and the movant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 686-89. Strickland imposes a "highly demanding" standard upon a movant to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) ("Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, we have cautioned that it is 'only the rare claim of ineffectiveness that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'"). Prejudice requires proof "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of

the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

1. Inducement to plead guilty

Lopez-Chapa contends that his counsel provided ineffective assistance to him by inducing him to enter into a plea of guilty based upon the belief that the Government would file a motion to allow the Court to depart from the Sentencing Guidelines pursuant to Section 5K1.1. He pled guilty pursuant to a Guilty Plea Agreement with the Government. (Docket No. 66.) As part of the Guilty Plea Agreement, he agreed to cooperate fully and truthfully with the Government and agreed that the Government, if it determined, in its sole discretion, that he had fulfilled all of his obligations of cooperation, would move to allow the Court to depart from the Sentencing Guidelines pursuant to U.S.S.G. § 5K1.1. (Guilty Plea Agreement at 5-9.)

During the January 29, 2002 plea hearing, prior to entering his plea of guilty to Count I of Information No. 02-03, Lopez-Chapa swore an oath to tell the truth in response to questions from the Court. (1/29/02 N.T. at 2.) He also told the Court that he understood that his answers to the Court's questions would be subject to the penalties of perjury. (Id. at 2-3.) The Court then conducted a plea colloquy pursuant to Federal Rule of Criminal Procedure 11. In response to the Court's questioning, Defendant swore under oath that he was satisfied with the representation of

his attorney, David Kozlow. (Id. at 7.)

During the plea colloquy, the Assistant United States Attorney summarized the terms of the Guilty Plea Agreement between Lopez-Chapa and the Government, including the following:

The plea agreement between the parties also includes language outlining the defendant's agreement to cooperate with the Government and the potential for the Government to file a - a motion for a sentencing reduction on the defendant's behalf prior to sentencing. At that point, no decision has been made as to whether the Government will file that motion.

(Id. at 11.) In response to questioning by the Court, Lopez-Chapa agreed, under oath, that this provision (as summarized by the Assistant United States Attorney) was part of his plea agreement with the Government, that he had signed the written Guilty Plea Agreement, and that he had discussed the Guilty Plea Agreement with his counsel prior to signing it. (Id. at 12.) The Court also asked Lopez-Chapa whether anyone had "made any threat or any promise or any assurance to you of any kind, other than what's been set forth in the plea agreement to convince or persuade or induce you to plead guilty in this case? (Id.) He responded, under oath, "No, your Honor." (Id.)

The Court finds that Lopez-Chapa understood, prior to pleading guilty to Count I of Information No. 02-03, that it was up to the Government, in its sole discretion, whether to file a Section 5K1.1 Motion, and that the Government had not decided whether it would file such a Motion at the time of his guilty plea. The Court also

finds that he was not induced to enter a guilty plea based upon a belief that the Government would file such a Motion. Accordingly, Lopez-Chapa's claim of ineffective assistance of counsel is denied with respect to his claim that his counsel induced him to enter a guilty plea.

2. Aggravated role enhancement

Lopez-Chapa contends that his counsel provided ineffective assistance to him by failing to object to an enhancement to his base offense level for an aggravated role in the offense pursuant to U.S.S.G. § 3B1.1(a). Defendant stipulated, in his Guilty Plea Agreement with the Government, that he "was an organizer [or] leader of criminal activity, that is, a conspiracy to distribute marijuana, that involved five or more participants or was otherwise extensive, and therefore his base offense level is increased by four levels pursuant to Sentencing Guidelines § 3B1.1(a) based upon his role in the offense." (Guilty Plea Agreement ¶ 10.d.) During the January 29, 2002 plea hearing, the Court asked Lopez-Chapa whether that stipulation was part of his plea agreement with the Government. Lopez-Chapa stated, under oath, that it was. (1/29/02 N.T. at 12.) The Court finds that Lopez-Chapa's counsel was not ineffective for failing to object to an enhancement which Lopez-Chapa had stipulated should be applied at sentencing. Accordingly, Lopez-Chapa's claim of ineffective assistance of counsel is denied with respect to his claim that his counsel failed to object to the aggravated role enhancement.

3. Dangerous weapon enhancement

Lopez-Chapa contends that his counsel provided ineffective assistance to him by failing to object to the Probation Officer's recommendation that his base offense level be increased by two levels for possession of a dangerous weapon in connection with a drug offense pursuant to U.S.S.G. § 2D1.1(b)(1). (See Pre-Sentence Investigation Report ¶ 28.) Application Note 3 to Section 2D1.1 explains the enhancement as follows:

[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

U.S.S.G. § 2D1.1 comment. n.3; see also United States v. Pitt, 193 F.3d 751, 764 (3d Cir. 1999). Kozlow informed the Probation Officer, prior to sentencing, that he objected to the application of Section 2D1.1(b)(1) in this case on the grounds that it was improbable that the weapon was connected with the drug offense. (Pre-Sentence Investigation Report, Obj. 2.) He also made this objection in open court during Lopez-Chapa's sentencing. (11/21/02 N.T. at 7-12.) The Court finds that Kozlow did make the objection sought by Lopez-Chapa and did argue in support of that objection at sentencing. Consequently, the Court cannot find that counsel's performance fell well below an objective standard of reasonableness in this case.

Furthermore, Lopez-Chapa has not established that Kozlow's performance prejudiced him, resulting in an unreliable or fundamentally unfair outcome. See Strickland 466 U.S. at 687. The following facts, which Defendant admitted, through counsel, were before the Court with respect to this enhancement at sentencing: at the time of Defendant's arrest, the police found a fully-loaded SIG-Sauer .45 caliber semiautomatic handgun in the southeast bedroom of his home. (Id. at 7.) In the same room, the police found a two-way radio scanner on the dresser and someone hiding under the bed. (Id.) Police also found 1,800 pounds of marijuana in the middle bedroom and loose marijuana, plastic bags, scales, wrapping, and plastic gloves in the northeast bedroom. (Id.)

Kozlow argued, at sentencing, that Section 2D1.1(b)(1) could not be applied to Lopez-Chapa based upon these facts:

Now, the Government has argued and the Probation Department has asserted that the gun is registered to him. We have objected generally to the gun enhancement. . . . But, even if the Government's assertion were accepted by the Court, then it's inconsistent with someone having a gun in connection with a drug business to have it registered. . . . And, there's no evidence whatsoever that this gun was used by Mr. Lopez-Chapa. . . . Is there any evidence that he had it out of the house with him when he was somewhere else? In fact, there's no evidence whatsoever to suggest, other than its mere presence, that the gun had anything to do with the drugs that were seized from the house.

In addition, the agents themselves from the Department of Public Safety when they came into the house, I believe it's undisputed, that they did not seize the gun as evidence. In fact, the Government in its proffer to the

Court and in the Probation Department's assertions to the Court, they both suggest that the agents came in, they called in to see if it was registered. They unloaded it and left it in the house. Then they seized the - - from other areas in the house the drugs and paraphernalia. So that the agents themselves did not seize it as a piece of critical evidence in the case.

I submit that mere presence at the location is not enough.

(Id. at 9-11.)

The United States Court of Appeals for the Third Circuit ("Third Circuit") has found that the possession of a dangerous weapon in connection with a drug offense enhancement applies where the weapon was present in the bedroom where the defendant was located at the time of his arrest and where a large quantity of cocaine was located. United States v. Goggins, 99 F.3d 116, 118 (3d Cir. 1996). The Third Circuit has also upheld the application of this enhancement where a search of the defendant's home after his arrest for possession with intent to distribute cocaine uncovered nine firearms. United States v. Demes, 941 F.2d 220, 223 (3d Cir. 1991) (agreeing that "the size and composition of Demes's 'arsenal' created a strong inference that he possessed these weapons in order to further the drug transactions."). This enhancement has also been applied where a gun was found in a "stash house" separate from the apartment where the defendant sold drugs. United States v. DeJesus, Crim.No. 97-378-02, 2000 WL 217530, at *3 (E.D. Pa. Feb. 11, 2000).

The Court overruled the objection based upon the gun's

presence "at a stash house owned by the defendant, at a house which was used by the defendant and his co-conspirators to receive, store, package and distribute the narcotics that are involved in this case." (Id. at 13.) The Court found "as fact and conclude[d] that this defendant possessed the weapon that's the subject matter of this enhancement and that its presence at a stash house in fully-loaded form and in reach of anyone in that bedroom constitutes possession of a weapon and clearly connects that weapon with the drug conspiracy." (Id. at 12-13.) Although the Court ultimately found in favor of the Government on this issue, the Court cannot find that Kozlow's performance with respect to the possession of dangerous weapon enhancement prejudiced Lopez-Chapa. Accordingly, Lopez-Chapa's claim of ineffective assistance of Counsel is denied with respect to his claim that his counsel failed to object to the dangerous weapon enhancement.

B. Breach of the Guilty Plea Agreement

Lopez-Chapa also contends that the Government breached the Guilty Plea Agreement, and violated his Fifth Amendment right to due process, by failing to file a Section 5K1.1 Motion on his behalf. As discussed in Section III.A.1. above, Lopez-Chapa understood that the Government had the sole discretion to decide whether to file a Motion pursuant to Section 5K1.1. The Government was under no obligation to file such a motion unless it decided that he had fulfilled all of his obligations of cooperation. The Government contends that Lopez-Chapa "did not provide any information prior to sentencing that met the criteria for filing a §5K1.1 motion." (Govt's Mem. at 14.) Lopez-Chapa has submitted no evidence on the record of this Motion that he did provide such evidence prior to sentencing.² Consequently, the Court finds that the Government did not breach the Guilty Plea Agreement.

Lopez-Chapa also asserts that the Government's failure to file a motion pursuant to Section 5K1.1 violated his right to due process. The Fifth Amendment guarantees that no person shall be deprived of liberty by the federal government without due process of law. The Fifth Amendment has both procedural and substantive components. As Lopez-Chapa does not claim to have been deprived of any particular procedure by the Government, the Court treats

²To the extent that Lopez-Chapa has provided such information since his sentencing, such information could provide the basis of a motion for reduction of his sentence pursuant to Federal Rule of Criminal Procedure 35.

this claim as a substantive due process claim. The substantive due process clause of the Fifth Amendment "forbids the government from infringing upon certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Ashley v. Ridge, 288 F. Supp. 2d 662, 668 (D.N.J. 2003) (citing Reno v. Flores, 507 U.S. 292, 302(1993)) (emphasis in original). The Fifth Amendment right to substantive due process "prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746 (1987) (internal citations omitted). As the Government did not breach the Guilty Plea Agreement by failing to file a Motion pursuant to Section 5K1.1, its failure to file such motion cannot shock the conscience. Lopez-Chapa's Motion is, accordingly, denied with respect to his claim that the Government breached the Guilty Plea Agreement and violated his Fifth Amendment right to due process by failing to file a motion pursuant to Section 5K1.1 prior to sentencing.

An appropriate order follows.

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 02-03-4
 :
 : CIVIL ACTION NO. 03-6740
 BENITO MARTIN LOPEZ-CHAPA :

AND NOW, this 4th day of June, 2004, upon consideration of Defendant Benito Martin Lopez-Chapa's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 129), and all attendant and responsive briefing thereto, and the record of this case, **IT IS HEREBY ORDERED** that said Motion is **DENIED** in all respects. As Defendant has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

John R. Padova, J.